the citizens. If they would be unfair to citizens, we cannot defend fairness of them when applied to the more helpless alien. This is at the root of our holdings that the alien must be given a fair hearing to test an official claim that he is one of a deportable class."

The court in Shaughnessy v. Mezei, 345 U.S. 206 (1953) further elaborated, "The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine witnesses, and to produce evidence in one's own behalf, is especially necessary. The court stated both the old proceedings by which one may be bound to keep the peace, and the newer systems are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi regime in Germany installed a system of "protective custody" by which the arrested could claim no judicial or other hearing process. As a result the country was filled with concentration camps and summary detentions and deportations. Such practices once established with the best of intentions, will drift into the oppression of the disadvantaged in this country as surely as it has elsewhere. Differences in the process of administration make all the difference between a reign of terror and one of law."

It is well-settled that the Fifth Amendment entitles an alien to due process of law in a removal proceedings. Reno v. Flores, 507 U.S. 292, 306, 123 L.Ed.2d, 1, 113 S. CT. (1993); also Felzcerek v. INS, 75 F. 3d 112, 115 (2nd Cir. 1996).

Herein the Petitioner seeks due process by asking for a review of his claim for relief from deportation. Denial of review in this instance served no equitable purpose and served to punish the Petitioner for the error of the judge in not giving sufficient weight to the equities of

his argument which indicate that he is not being treated equally under the Due Process provisions of the Fourteen Amendment.

The Court of Appeals must review the BIA's denial of a Motion To Reopen for abuse of discretion, regardless of the underlying relief required. INS v. Doherty, 502 U.S. 314, 323 (1992). The Court must reverse the denial of a Motion To Reopen if the denial is "arbitrary, irrational, or contrary to law." Singh v. INS, 213 F. 3d 1050 (9th Cir. 2000).

REASONS FOR GRANTING THE WRIT

In this instance the Immigration Judge had the authority to adjudicate the Motion to Reopen when it was remanded back by the BIA. The Immigration Judge was obligated to consider any new facts the Petitioner intended to establish, when the later made a showing as to why those facts were unavailable to the Petitioner initially. Matter of Leon-Orosco and Rodriguez Colas, 19 I&N Dec. 136, 139 (BIA 1983, A.G. 1984); 8 C.F.R. Section 103.5 (1996).

Herein the Petitioner has stated that he intends to establish the extreme hardship his United States citizen children will suffer if he is removed to Mexico. He is prepared to establish this by introduction of a psychological report and through the statements of the Mexican Consulate.

The Petitioner was not able to introduce this evidence at the May 1, 2000, hearing because he had not yet discovered or observed the severity of the psychological symptoms demonstrated by his son in

reacting to his removal from the United States. At that time he had had not yet sought the services of a psychologist to handle the negative impact that had surfaced.

A Motion to Reopen must also show that the petitioner is prima facie eligible for the relief sought. INS v. Abudu, 485 U.S. 94, 97 (1988). The Petitioner herein has demonstrated all criteria. He has been present in the United States for a continuous period of more than ten years prior to his Notice To Appear. He has demonstrated that he is a person of good moral character. He has also demonstrated that his removal; would result in extreme hardship to his United States citizen children.

A Motion to Reopen can only be denied under proper legal authority. In this instance, the Petitioner's motion was denied because the Immigration Judge found that the evidence submitted by the Petitioner was not evidence that was previously unavailable or could not have been discovered. The BIA then summarily affirmed the Immigration Judge's decision without opinion.

Ramon Sepulveda v INS, 743 F. 2d 1307 (9th Cir 1984). and Guzman v. INS, 318 F. 3d 911, 912, (9th Cir. 2003), clearly establish that evidence cannot be considered "new," if it existed prior to the deportation hearing. In this instance Guzman had reported the wrong date of entry during his hearing and discovered that the correct date would have made him eligible for relief. The Immigration Judge denied the motion To Reopen and this decision was affirmed by the BIA. It was determined that there was no abuse of discretion in that this information was available at the time of the hearing and that Guzman could have obtained this information through research of documents or in talking with other individuals.

In Ramon Sepulveda, the Court found that a Motion to Reopen was not warranted when the Government failed to obtain a birth certificate which would have proved that the alien was not born in this country. It was also discovered that this information was available at the time of the hearing and there was no excuse for failing to do so.

In Sida v. INS, 665 F. 2d 851 (9th Cir. 1981), the Court dealt with "new evidence,' that could not have been presented at the hearing and was therefore considered "recently discovered evidence." In this case the respondent discovered that her minor child became seriously ill with a pulmonary illness caused by conditions in her native Thailand. This sudden illness made her eligible for Cancellation of Removal. The Court found that the documentation of this illness submitted by he minor child's physician established the presence of "new evidence."

The case at hand is analogous to Sida in that Petitioner's American citizen child's psychological condition had been recently discovered after the BIA denied the Petitioner's application for Cancellation of Removal. When the minor child began to experience anxiety and to have nightmares he was taken to a psychologist. It was determined that the minor child who is large and overweight for his age and who suffers form low self-esteem, is subject to a great amount of peer rejection and non-acceptance. Psychological assessments affirmed that this situation will only intensify when this child is forced to start school over again in Mexico due to his lack of language skills. Bryan will be disproportionately large for his age, especially in comparison to the other school children who are poorly fed and will suffer additional ridicule and torment by being scholastically demoted in Mexico. The intense

humiliation he will experience at the hands of the first graders in Mexico will have a profoundly negative emotional affect and cause him extreme emotional distress.

The introduction of this "new evidence" could not have been foreseen or anticipated at the time of the earlier proceedings on behalf of the Petitioner.

The conditions under which such evidence should have been "foreseen," is enumerated in INS. V. Doherty, 502 U.S. 314, 326 (1992). Herein the alien sought to introduce new evidence that he would face prosecution in the United Kingdom for past criminal acts if he was returned there. The Supreme Court found that the alien should have notified the Court of this evidence at his deportation hearing when the Government first opposed the country of removal he had selected, and that he should have told the Court of any reason why he could not be returned to his native country, the United Kingdom, once his removal to Ireland, his country of choice, was denied. It was determined that the alien should have anticipated that he would face prosecution in his own country when informed that he was going to be returned there and therefore could have informed the Court at that time. Thus it was determined that the new evidence presented failed to qualify as such because it should have been foreseen.

In this case the Petitioner had no prior notice regarding the serious psychological affect that moving to Mexico would cause Bryan and was not able to anticipate this at the time of his hearing. There is no indication that the Immigration Judge considered anything other than Bryan's language skills in making his decision, nor that his physical or mental health were ever suggested as

considerations in fulfilling the Cancellation of Removal requirements. I&NA Section 240A

Herein the Petitioner had no understanding of the need to elaborate in his hearing about the emotional consequences of his deportation upon his son Bryan and there was also no basis for him to elaborate on these feelings since Bryan's nightmares and anxiety did not begin until the consequences of the denial of the Petition For Cancellation of Removal were explained to the minor.

The Court has clearly established that neither the BIA nor the Immigration Judge can summarily dismiss a Motion to Reopen. Although aliens do not have an absolute right to discretionary relief as stated in Santana-Figueroa v. INS, 644 F. 2d 1354, 1357 (9th Cir. 1981), the same principals apply in Motions to Reopen.

Therefore the BIA is required to consider newly presented evidence and rule on the merits. It cannot refuse to consider new evidence whenever it feels that the alien does not merit consideration. Additionally the BIA must address the evidence presented and state the reason why it is not sufficient. Sida v. INS, supra.

In this case, the Immigration Judge summarily rejected the Petitioner's Motion To Reopen based on the fact that she could not find the evidence submitted by the Respondent to be evidence that was not previously available or could not been presented at a previous hearing. The Immigration Judge offered no further explanation of why this evidence did not meet the requirements.

The Court has also established in numerous cases that a denial of a Motion To Reopen should be reversed when the nature of the evidence is compelling. The nature

of the evidence is compelling when it is of the type that establishes an element of the relief sought. Bolshakov v. INS, 133 F. 3d 11279, 1280, (9th Cir. 1998). Essentially in Bolshakov, the Court found that the evidence did not go to the heart of the matter in that case. Therein the issue was whether or not the petitioner would suffer persecution based on statutory enumerated grounds.

In the case at hand the evidence is compelling because it can establish that the Petitioner's son will suffer exceptional and extreme hardship if the Petitioner is removed to Mexico.

In Matter of Monreal, 23 I&N Dec. 56, a new hardship standard was set which required that, the hardship need not be "unconscionable" as was the standard under former Suspension of Deportation cases. This case has significant ramifications upon the case at hand

The Petitioner has obtained new evidence in the form of a psychological report prepared by a Licensed Educational Psychologist. This evaluation specifies that the Petitioner's removal from the U.S. and the removal of his American citizen children would result in an extreme emotional impact to his son Bryan. The report further specifies that because Bryan is a large overweight child, with low self esteem, his demotion would subject him to peer rejection and lack of social acceptance. Furthermore consistent peer pressure would probably result in Bryan not completing high school, thus negatively impacting his future existence. This would result in excessive emotional distress and psychological conflicts. This very situation producing specific psychological symptomology establishes that the impact on Bryan is substantially different than what would normally be expected form the deportation of an alien with close family members.

For this reason the new evidence is of a compelling nature and goes to the hardship element on which the petitioner's Cancellation of Removal was denied.

Failure to consider all the relevant facts bearing weight on extreme hardship or to articulate the reason for denying the relief constitutes an abuse of discretion. Salmeda v. INS, 70 F. 3d 447 (7th Cir. 1995). "Relevant factors though not extreme in itself, must be considered in the aggregate in determining whether extreme hardship exists." Matter of Inge, 20 I&N Dec. 880 (BIA 1994).

The Court held in Shoafera v. INS, 2000 U.S. App. LEXIS 31361d (9th Cir. 2000) at 12, that "When factors are relevant the Immigration Judge has a duty to develop them. The duty of the immigration judge is analogous to that of the administrative law judge in social security disability cases, and thus the immigration judge had a duty to fully and fairly develop the record."

Unless the Petitioner is afforded the right to bring forth all relevant factors and evidence, the merits of his claim and the record of his case will not be fully or fairly developed. In this instance the Petitioner was not ware of the profound psychological impact his deportation would have on his son Bryan, until after his hearing.

Courts have held that hardship can be defined as economic issues, Matter of Recinas, 23I&N Dec.476 (BIA 2002), or as other types of issues that lead to non-economic hardship. Tukkhowinich v. INS, 64 FD. 3d 460 (9th Cir. 1995). Herein the issues are more than economic. There is essentially more at stake than the fact that the American citizen child of the Petitioner will suffer

emotionally due to the loss of his Legal Permanent Resident family members, or that his father, the Petitioner, will be forced to work and support the family on less than five dollars per day. The impact of the removal to the minor will define his psychological health and well-being for the rest of his life.

An abuse of discretion on the part of a reviewing Court must create a situation in which the abuse negatively and distinctly impacts the outcome of the case. Rejection of all evidence presented, without carefully analyzing all of it terminates an alien's ability to obtain a favorable outcome. If the Court without thoughtful review of the Board's decision allows the dismissal of all evidence presented, any alien can fail to meet the requisite standard for qualification. While the Court is vested with authority and discretion, it must be exercised wisely and in a manner that assures that aliens who are before it are able to receive a full and fair review of their cases. This is becoming more important since fewer and fewer forms of judicial review are available under the present immigration laws.

When strong evidence is presented and yet disregarded, this goes directly to the merits of the case and is clearly an incorrect decision. When there is no justification for rejection of evidence, an abuse of discretion is likely present.

Herein the conduct of the reviewing Court denotes the rise of a colorable constitutional claim. The Court found in Chavez-Murillo v. INS, 1999 WL 728521 (9th Cir. 1999), that the Congressional intent to preclude judicial review of constitutional claims must be clearly evidenced. When the Board initially made a decision to affirm the decision of the Immigration Judge without opinion, it suggests that the Board failed to consider and evaluate the

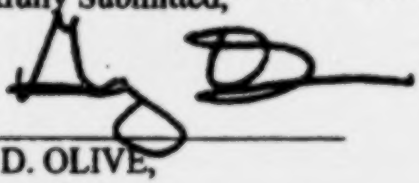
process, raising an issue of a colorable constitutional claim.

CONCLUSION

Petitioner, through his counsel, contends that the Ninth Circuit Court of Appeals erred in denying his Petition for Review and that this denial was manifestly contrary to law. Based upon the aforementioned, Petitioner respectfully requests that this Honorable Court grant the Writ of Certiorari, and permit his case to be reopened and remanded so that he can present new evidence that will entitle him to relief from removal before the Immigration Court.

Dated: September 29, 2005

Respectfully Submitted,



GARY D. OLIVE,
Attorney at Law

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CIPRIANO SALDIVAR-GUERRERO Petitioner, v. ALBERTO R. GONZALEZ, Attorney General, Respondent.	No. 04-72192 INS Nos. A76-611-057 **JUDGMENT**

Upon Petition for Review of a Decision of the Board of Immigration Appeals

The cause came on to be heard on the transcript of the Record from the Immigration and naturalization Service and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the petition for review of the said decision of the Board of Immigration Appeals in this cause be, and hereby is **DISMISSED in part; DENIED** in part.

Filed and entered 07/15/05

APPENDIX A

U.S. Department of Justice Decision of the Board of Immigration Appeals
Executive Office of Immigration Review

Falls Church, Virginia 22041

Date: JAN 13 2003

File: A76 611 057 Los Angeles

In re: CIPRIANO SALDIVAR-GUERRERO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: M. Rito Corrales, Esquire

ON BEHALF OF SERVICE: Adalberto M. Sardinas
Assistant District
Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act {8 U.S.C. Section 1182(a)(6)(A)(i)
Present without being admitted or paroled

APPLICATIONS: Cancellation of removal; voluntary departure

The Immigration and naturalization Service timely appeals an Immigration Judge's may 1, 2000, decision granting the respondent's application for cancellation of removal under Section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. Section 1229b(b) (2000). We find that the respondent has not established that his removal would result in exceptional and extremely unusual hardship. Accordingly, the Service's appeal will be sustained, and the case will be remanded to the Immigration Judge in order to establish the respondent's eligibility for voluntary departure.

APPENDIX B

In granting the respondent's application for cancellation of removal, the immigration Judge reasoned that the respondent's children would face exceptional and extremely unusual hardship if they had to return to Mexico with their father because the family would have to "start all over again," after achieving what he, (the respondent), has achieved here in the United States." I.J. at 20. The Immigration Judge noted that the respondent was hardworking and industrious and commended him for achieving "over and above what a normal person would try to achieve for his family." I.J. at 18. The Immigration Judge also asserted that it would be difficult for the respondent to financially support his children in Mexico, because "he would not be able to get the type of money he's making in the United States certainly as a busboy in Mexico, and certainly would not be able to save enough money to achieve anything for his children as he has been able to do so today." I.J. at 19. Finally the Immigration Judge noted that the respondent's children would lose the relationship of the loving and supporting family members they have in the United States. I.J. at 18.

On appeal, the Service argues that the Immigration Judge erred in granting the respondent's application for cancellation of removal. The Service contends that the respondent's children are young, healthy, and the oldest can communicate in Spanish. See Service's Appeal Brief at 4. The Service argues that even though the respondent was able to save money and buy a home in the United States, this was insufficient to show that the children would suffer substantially beyond that which ordinarily would be expected to result in their father's removal. *Id. at 5.* Finally the Service notes that the respondent did not show that his children would not be able to receive any education nor have their daily needs met if they moved to Mexico. *Id.* As such, the respondent's two United States citizen children would not face any more hardship than would normally be expected form the removal of their father from

the United States to Mexico. *Id.*

In response the respondent adopts and expands the Immigration Judge's reasoning. The respondent argues that because of the children's ages and because of the respondent's laudable achievements, it would be an exceptional and extremely unusual hardship to the United States citizen children if they were forced to go to Mexico with their father. See Respondent's Appeal Brief at 3.

In this case, the respondent's qualifying children are 9 and 3 years old. The respondent indicated that his children would accompany him if he is removed to Mexico. Regarding the respondent's ability to support his children if he is removed to Mexico, both he and his wife are in good health, and, as such, would physically be able to work to support heir children. There is also no objective evidence in the record indicating that he or his wife could not find employment in Mexico. The respondent has saved enough money to buy a $60,000 house and an automobile in cash. *See I.J. at 18.* We note that these assets could help ease the family's transition to Mexico. *See Matter of Andazola*, 23 I&N Dec. 319, 324 (BIA 2001). Moreover, whatever financial difficulties the children might encounter are not likely to be significantly different from those occasioned by removal generally, particularly to a country with a weaker economy and comparatively fewer employment opportunities. Adjustment to a lower standard of living generally will be insufficient, in and of itself, to support a finding of exceptional and extremely unusual hardship. *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

Regarding the health and education of the respondent's two young children, neither child has any serious health concerns that militate against them relocating to Mexico. *Id.*

(stating that cancellation may be appropriate where a qualifying child has "very serious health issues" or "special needs in school). There is no objective evidence of record hat the respondent's children would not be able to receive an education in Mexico.

Finally, regarding Familial ties in the United States, we note that the respondent's children have significant family ties in the United States. However they also have many relatives living in Mexico, including all four grandparents. While the respondent and his children are very close to their family members living in the United States, it also appears that they are close to their family members living in Mexico, as the grandparents have visited from Tijuana on several occasions. As such, there is noting to indicate that the respondent's children would be without any familial support, be it emotional or otherwise, if hey were to accompany their father to Mexico.

The children were ages 7 and 1 at the time of the Individual Hearing

Therefore considering all of the factors presented individually and cumulatively, we find that the respondent has not met his burden of establishing that his United States citizen children would suffer exceptional and extremely unusual hardship if removed to Mexico. The respondent has not provided evidence to establish that his qualifying relatives would suffer hardship that is substantially different from, or beyond, that which would normally be expected from the removal of an alien with close family

APPENDIX B

members here. *See id.*

Based on the foregoing, we find that the respondent has not demonstrated eligibility for cancellation of removal under section 240A(b) of the Act. However the issue of whether the respondent is eligible for voluntary departure is unresolved. Although the respondent asked for voluntary departure if he was ordered removed (Tr. at 2), he was never qualified for this form of relief at the Individual hearing. Therefore, we find it necessary to remand the respondent's case to the Immigration Judge for the sole purpose of establishing the respondent's eligibility for voluntary departure. Accordingly, the following orders will be entered.

ORDER: The Immigration and Naturalization Service's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court to afford the respondent an opportunity to apply for voluntary departure under section 240B of the Act, 8n U.S.C. Section 1229c.

"s/_____"
FOR THE BOARD

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT LOS ANGELES, CALIFORNIA

File No: A 76 611 057

IN REMOVAL PROCEEDINGS

In the Matter of
CIPRIANO **SALVIDAR-GUERRERO**
Respondent

CHARGE: Section 212(a)(6)(A) of the Immigration and Nationality Act. {8 U.S.C. Section 1182(a)(6)(A)} *Entered without permission or parole*

APPLICATION: Motion to Reopen

ON BEHALF OF RESPONDENT:	**ON BEHALF OF SERVICE:**
Alan R. Diamante, Esq. **523 W. 6th Street Suite 210** **Los Angeles, Ca. 90014**	**Lee P. Crystal** **Asst. District Counsel** **606 S. Olive St. 8th Floor** **Los Angeles, Ca. 90014**

DECISION AND ORDER OF THE IMMIGRATION JUDGE

1. Procedural History

Respondent, Cipriano Saldivar-Guerrero, is a native and citizen of Mexico. On or about June of 1986, Respondent entered the United States at or near San Ysidro, California without being admitted or paroled. Accordingly, on march 18, 1998, the Service issued to the Respondent a Notice to Appear(NTA). In the NTA, the

Service charged the Respondent with removeability pursuant to section 212(a)(6)(A) of the Immigration and naturalization Act (INA). See Exhibit 1. On January 8, 1999, the service filed the NTA with the Los Angeles Immigration Court, thereby vesting it with jurisdiction over the proceedings. See 8 C.F.R. Section 3.14(a) (2003).

On March 1, 2003, the Immigration and naturalization Service ceased to exist as an agency under the U.S. Department of Justice and became part of the newly-formed Department of Homeland Security. For the present time, however, the Court will continue to refer to the Immigration and Naturalization Service as "the Service" in exclusion, deportation and removal proceedings initiated prior to March 1, In addition, the Court will continue to cite to Chapter 1 of Title 8 of the Code of Federal regulations for authority in accordance with 68 FR 9824 (Feb. 28, 2003).

On April 2, 1999, Respondent appeared before the Court, and through Counsel, admitted all the factual allegations contained in the NTA and conceded the charge of removeability. Respondent also requested relief from removal in the form of Cancellation of Removal pursuant to INA section 240A(b), and in the alternative, Voluntary Departure under INA section 240(a)(1). Respondent designated Mexico as the country of removal, should such become necessary.

On May 1, 2000, upon completion of testimony from the Respondent, the Court granted Respondent's request for relief after determining that the Respondent satisfactorily established eligibility for cancellation of removal. Subsequently, on may 18, 2000, the Service filed an appeal with the Board of Immigration Appeals ("the Board").

On January 13, 2003, the Board sustained the Service's appeal and overturned the Court's decision granting Respondent's request for cancellation of removal. However, as the Board found that Respondent was never qualified for the relief of voluntary departure during the merits hearing. The Board remanded the case back to the Court solely for the purpose of determining Respondent's eligibility for voluntary departure. Pursuant to the Board's order, the Court reset the case for a hearing to determine Respondent's eligibility for such relief. On February 19, 2003, the Court granted voluntary departure to Respondent.

On April 15, 2003, Respondent, through counsel, filed a Motion to Reopen with the Court. The Service filed its opposition to Respondent's motion on April 22, 2003.

II. Law and Analysis

Motions to reopen must be filed within 90 days of the date of entry of a final administrative order or removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. 8 C.F>R. Section 3.23(b). The motion shall not be granted unless it appears that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. See 8 C.F.R. Section 3.23(b)(3); See also Matter of M-S-, 22 I&N Dec. 349 (BIA 1998).

In the present matter, Respondent is seeking to reopen his case in order to submit "recently discovered evidence" to support his claim that he is eligible for cancellation of removal. However, as this Court has made a determination regarding Respondent's eligibility for cancellation of removal, and the Board overturned that decision, the Court cannot now reopen a case to adjudicate

a matter the Board has already decided. Moreover, the Court does not find the evidence submitted by Respondent to be evidence that was previously unavailable or could not have been discovered. In fact, the Court believes that Respondent could have presented such evidence during the previous hearing. Therefore the Court will deny the Respondent's Motion to Reopen.

Based on the foregoing, the following order shall enter:

ORDER

IT IS ORDERED that Respondent's motion to Reopen his removal hearing be, and the same is hereby **DENIED.**

DATE: 5-12-03 "s/_____"
Dorothy Dunkel-Bradley
U.S. Immigration Judge

Cc: Assistant District Counsel
Department of homeland Security
606 S. olive St. 8th Floor
Los Angeles, Ca. 90014

INA Section 240A

(A) The Attorney General may, in his or her discretion, cancel removal and adjust the status from such cancellation in the case of an alien who is removeable from the United States if the alien demonstrates that

(i) the alien has not been convicted of an aggravated felony and

(ii) the alien is not described in paragraph (4) of section 237(a) or paragraph (3) of section 212(a) of the Act; and

(iii) has been physically present in the United States for a continuous period of not less than 10 years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character, and is a person whose removal would, in the opinion of the Attorney general, result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence.

EXHIBIT D